DOCUMENT RESUME

ED 308 711 FL 018 074

AUTHOR Solan, Lawrence
TITLE The Judge as Linguist: Linguistic Principles as a Rule of Law.
PUB DATE Oct 86
NOTE 12p.; In: Proceedings of the Annual Eastern States Conference on Linguistics (3rd, Pittsburgh, PA, October 10-11, 1986). The complete Proceedings are available from the Dept. of Linguistics, Ohio State University, Columbus.
PUB TYPE Information Analyses (070) -- Viewpoints (120) -- Speeches/Conference Papers (150)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Court Judges; Court Litigation; *Decision Making; *Evaluation Utilization; *Language Processing; Language Role; Linguistic Theory; Syntax
IDENTIFIERS Antecedents; Connotations

ABSTRACT

The role of court judges as linguists is discussed. Linguistic issues arise in courts when lawyers attempt to convince a court that a statute, insurance policy, or contract should be interpreted as favoring their own client's interests, with respect to resolving a dispute that depends on the proper construal of a particular document. An examination of what judges say about linguistics and about their role as linguists casts some light on the judicial process. It is maintained that linguistic principles do not operate as the courts claim they do. Moreover, disputes exist even among judges in the same court about both the proper characterization of linguistic rules and their relevance to the decisionmaking process. The "last antecedent rule" is discussed in its application to a California case, "Anderson v. State Farm Mutual Automobile Insurance Co. (1969)." The linguistic processing strategies used with the "last antecedent rule" are also described, and rules governing the interpretation of "the" and "and" are reviewed. It is concluded that the use of linguistic principles can provide legitimacy to the legal system, creating the illusion of science as the basis for decision making. (DJD)

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by

Lawrence Solan

from

Proceedings of the Third

EASTERN STATES CONFERENCE ON LINGUISTICS

The University of Pittsburgh

Pittsburgh, Pennsylvania

October 10-11, 1986

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THE JUDGE AS LINGUIST: LINGUISTIC PRINCIPLES AS RULE OF LAW

Lawrence Solan
Law Firm of Orans, Elsen & Lupert
New York City

From time to time, judges rely on what appear to be subtle principles of linguistic theory to determine the outcome of a case before them. This is serious business. As will become clear from the examples discussed below, the decisions based on iinguistic argumentation determine such important matters as whether an individual was properly convicted of a felony and whether the company that insures a driver involved in a serious automobile accident will have to pay to compensate others for injuries and property damage caused by the driver.

The linguistic issues arise when lawyers for opposing parties attempt to convince a court that a statute or insurance policy or contract or some other legal document should be interpreted as favoring their own clients' interests with respect to a dispute whose resolution depends crucially on the proper construal of the particular document. Assuming no dispute about what events occurred, it is for the judge to decide what should follow from applying the document to the events before him. In so doing, the court, urged in different directions by the opposing lawyers, will often resort to recognized principles of interpretation, such as attempting to divine the intention of the drafters of the document. I will return to these principles below. On occasion, the principles adduced by a court to construe a document are linguistic, and it upon these that I wish to focus.

An examination of what judges say about linguistics and of their own roles as linguists casts some illumination on the judicial process. From the discussion that follows, it should become clear that the linguistic principles do not operate as the courts claim they do. Moreover, disputes exist even among judges in the same court about both the proper characterization of the linguistic rules and their relevance to the decisionmaking process. Consequently, as has been noted by legal scholars for decades, see, e.g., Llewellyn (1950), principles of interpretation sometimes exist side by side with their opposites, creating a body of mutually inconsistent legal principles, available to any lawyer or judge who wishes to use them to support almost any position whatsoever.[1] Because of limitations on space, I will

concentrate on one example, the "last antecedent rule," alluding to others only briefly.

1. The Last Antecedent Rule

This section will explore a principle of law called the "last antecedent rule." The rule is widely applied both by the federal courts and by the courts of various states. Here, I will focus only on the rule as applied by the courts of California. I have limited the discussion to a single jurisdiction in order to allow historical analysis of the rule's application, and in order to avoid misunderstanding as a phenomenon a few sporadic applications of a rule from around the country over long periods of time.

The last antecedent rule has been a part of California law since the late nineteenth century. It is stated in (1), quoting from a 1969 California appellate court, as follows:

(1) A limiting clause is to be confined to the last antecedent, unless the context or evident meaning requires a different construction.

Anderson v. State Farm Mutual Automobile Insurance Co., 75 Cal.Rptr. 739,741 (2d Dist. 1969). The Anderson case involved a car owner's lawsuit against her insurance company. She lost and appealed. In an entertaining fashion, the appellate court explained that Mrs. Anderson had left her family at a county fair, and had driven off with a Mr. Larson in Mr. Larson's car. The newly met couple arrived at a restaurant where they spent several hours, after which time Mr. Larson excused himself to go to the restroom, never to return. Mrs. Anderson, who claimed to have consumed only part of a single drink during this period, testified that she left the restaurant and drove off in what she thought was Mr. Larson's car. It was not. Rather, it was Mr. Yocum's Cadillac. While driving Mr. Yocum's car, Mrs. Anderson was involved in an accident, injuring her and damaging Mr. Yocum's car. Mr. Yocum sued Mrs. Anderson (a resident of Nebraska just visiting California), and won a judgment of about $13,000. Mrs. Anderson then tried to collect from State Farm, the company that insured her with respect to her own car. In deciding the case, the court relied on the following portion of Mrs. Anderson's insurance policy:

(2) Such insurance as is afforded by this policy ... with respect to the owned automobile applies to

the use of a non-owned automobile by the named insured ... and any other person or organization legally responsible for use by the named insured ... of an automobile not owned or hired by such other person or organization provided such use is with the permission of the owner or person in lawful possession of such automobile. (emphasis added).

Id. at 741. In this instance, the named insured caused the accident. Is she covered by her policy even though she lacked the permission of the owner of the car that she was driving? Applying the last antecedent rule, the court said yes. The court reasoned that the second of the two conjuncts is the last antecedent, and therefore the owner's permission is not needed when the car is driven by the named insured herself. Had the car been driven by someone legally responsible for use by the named insured, then the owner's permission would have been required. The court also took into account the fact that no comma separates the second conjunct and the provided clause. Presumably, Mr. Yocum eventually got his $13,000 from Mrs. Anderson's insurance company.

2. Processing Strategies and the Last Antecedent Rule

Linguistically, the last antecedent rule resembles the minimal attachment strategy discussed by Frazier and Fodor (1978) and Frazier (1978, 1985), and the late closure strategy, discussed by Frazier (1978, 1985). Minimal attachment, quoting from Frazier (1985), is defined in (3).

(3) The minimal attachment strategy "specifies that incoming items are attached into a constituent structure representation of the sentence using the fewest nodes consistent with the wellformedness constraints of the language."

The strategy accounts for the garden path initially taken in parsing sentences like (4):

(4) John saw the book on the shelf was not the one he had lent to Carlos.

Its application to (4) prevents the processor from initially building the structure required for the interpretation of the book on the shelf as the subject of a that clause.

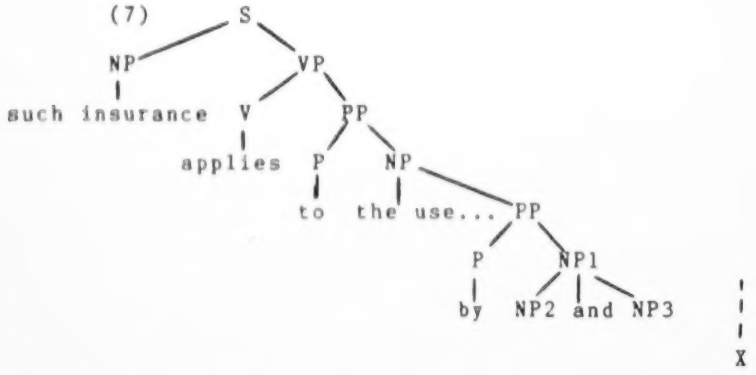
Late Closure is defined by Frazier (1985, 136) as follows:

(5) The Late Closure strategy specifies that incoming items are preferentially analyzed as a constituent of the phrase or clause currently being processed.

This accounts for the garden path initially taken in interpreting (6):

(6) After he ate the cake was ready to come out of the oven.

Returning to the last antecedent rule and Mrs. Anderson, we can begin to explain what is so unnatural about the court's construal of (2). The structure of (2), in relevant part, is (7).



In Anderson, the insurance company argued that X is attached to NP1, and thus modifies the entire compound NP and consequently modifies both of its conjuncts. Mrs. Anderson, who won, argued that X is attached to NP3, and therefore modifies only the last (in this case second) conjunct. Put somewhat differently, the dispute between the parties was whether, in using the late closure strategy, the processor regards NP1 or NP3 as the phrase currently being processed.

In general, grammatical operations do not disrupt a coordinate structure. They look at the larger phrase, rather than at the conjuncts within the larger construct. This was first noted by Ross (1967) in his formulation of the coordinate structure constraint. Nonetheless, it must be determined whether the processor's application of the late closure strategy

is subject to the coordinate structure constraint. Consider (8):

(8) John saw a woman and a man with a young child.

In (8), my preference is for a reading in which the young child is with both the woman and the man, suggesting the application of something like the coordinate structure constraint. Note that, consistent with late closure, the grammatically possible reading in which John is with the child at the time he saw the other two adults is an unlikely interpretation. Frazier and Fodor (1978) suggest that the processor applies the coordinate structure constraint through the first two conjuncts, but that once a third is added the processor runs out of memory space and regards the last conjunct as the phrase currently being processed for purposes of applying strategies such as late closure and minimal attachment. Of course, application of the coordinate structure constraint is at odds with the ruling in the Anderson case, in which a clause was held, as a matter of law, to modify only the second of two conjuncts.

The intuitions of some judges match my own. In 1975, the same court that decided Anderson on the basis of the last antecedent rule decided Board of Trustees of the Santa Maria Joint Union High School District v. Judge, 50 Cal.App.3d 920, 123 Cal.Rptr. 830 (2d Dist. 1975). In Judge, however, the court applied a legal principle just the opposite of the last antecedent rule. Citing a 1938 case as authority, the court rejected the last antecedent rule in favor of the rule set forth in (9).

(9) [W]hen a clause follows several words in a statute and is applicable as much to the first word as to the others in the list, the clause should be applied to all of the words which preceded it.

50 Cal.App.3d at 926, 123 Cal.Rptr. at 834. Let us refer to (9) as the "across the board rule."

In the Judge case , Theodor Judge, a school teacher, had been discharged as a result of his felony conviction for cultivating a single marijuana plant. When the school board attempted to fire him, he requested a hearing, and the matter ended up in court. The trial court held that the board could not discharge Mr. Judge. The appellate court agreed, applying the across the board rule to the California statute governing the discharge of teachers. The

relevant statutory language is presented in (10).

(10) No permanent employee shall be dismissed except for one or more of the following causes: ... (h) Conviction of a felony or of any crime involving moral turpitude.

Cal.Educ.Code Sec. 13403. Applying (9) to (10), the court held that "involving moral turpitude" modifies both disjuncts of subdivision (h). It further held that cultivating a marijuana plant is not a crime of moral turpitude. Mr. Judge kept his job.

The last antecedent and across the board rules have lived side by side in California for decades. In 1978, the Supreme Court of California described the across the board rule as an exception to the last antecedent rule, an analysis that is difficult if not impossible to understand since the court supplied no theory of when to apply the general rule and when to apply the exception. People v. Corey, 21 Cal.3d 738, 147 Cal.Rptr. 639 (1978). In defining the principles, courts almost always state them as subject to common sense, limiting their application to ambiguous constructions in which the context does not demand that the principle be abandoned. Many additional cases exist in which one or the other of these principles is presented as argumentation for a particular outcome, sometimes as the basis for interpreting criminal statutes. It is frequently referred to as a rule of grammar, and is never regarded as an arbitrary legal convention, like the colors of particular traffic signals. Most often it is listed as one of a number of principles of statutory interpretation.

During the past several years, California appellate courts have employed the last antecedent rule as partial justification for upholding criminal convictions, including convictions for sodomy by force and for illegal sale of narcotics. The statutory language in question for each case is presented below. First, consider the sodomy statute.

(11) Any person who participates in an act of sodomy with another person who is under 14 years of age and more than 10 years younger than he, or who has has compelled the participation of another person in an act of sodomy by force, violence, duress, menace, or threat of great bodily harm, shall be [subject to greater punishment]. (emphasis added)

Cal.Penal Code Sec. 286(c) (later revised). In People

v. Foley, 170 Cal.App.3d 1039,1052, 216 Cal.Rptr. 865,872 (3d Dist. 1985), the court held that the underlined portion of the statute quoted in (11) modifies only the second disjunct. Applying the last antecedent rule, the court upheld the conviction of an individual found to have engaged in sodomy with someone under 14 and more than 10 years younger than he, but not found to have applied force.

In People v. Hardin, 149 Cal.App.3d 994,997, 197 Cal.Rptr. 194,196 (5th Dist. 1983), a narcotics conviction was upheld based in part on the application of the last antecedent rule to the following statutory provision:

(12) ...[E]very person who ... sells any controlled substance whichis ... specified in subdivision (d), of Section 11055, unless upon the prescription of a physician [etc.] ... shall be punished.

...

(d) Any material, compound, mixture, or preparation whichcontains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system: (emphasis added)

(1) Amphetimine ...
(3) ... methamphetimine

Hardin had been convicted for selling a quantity of methamphetimine sufficiently small that it is not clear that the amount he sold had in and of itself a potential for abuse. His attorneys argued to the court that the underlined portion of the statute modifies the entire quantifier phrase, "any quantity of the following substances," while the government prosecutors argued that the underlined portion modifies only the NP, "the following substances." The court, applying the last antecedent rule, opted for the NP. Thanks to the late closure strategy, Mr. Hardin's conviction for selling methamphetimine was affirmed.

3. Disjunction - Another Example

Before considering some explanation for the presence in the law of both the last antecedent rule and its opposite, let us observe that other linguistic phenomena exist as legal principles, and similar observations can be made about them. Below, we will briefly look at one of these: rules governing the

interpretation of and and or. Consider the following statutory language:

(13) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed. (emphasis added)

18 U.S.C. Sec. 71. The statute in (13) allows certain individuals, who have committed perjury but have later recanted, to avoid prosecution. In United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1980), the court was asked to interpret the statute. Mr. Moore, who had lied to a grand jury and had been caught lying, was convicted of perjury despite his recantation and despite the fact that his perjury did not substantially affect the grand jury proceedings. Moore argued that he could not legitimately be convicted under the statute because he met the conditions of the first disjoint of (13), making the second disjoint, the requirement that it not be manifest that the perjury will be exposed apart from any recantation, irrelevant. The court responded as follows:

(14) Normally, of course, "or" is to be accepted for its disjunctive connotation, and not as a word interchangeable with "and." But this canon is not inexorable, for sometimes a strict grammatical construction will frustrate legislative intent. That, we are convinced, is precisely what will occur here unless "or" is read as "and."

A huge amount of case law rests on the interpretation of conjunction and disjunction. Not surprisingly, there exists a wide array of legal rules governing the construal of and and or, which like the last antecedent and across the board rules, are confusing, self-contradictory and incoherent. Further discussion of this and other such linguistico-legal phenomena will have to await future papers.

4. Philosophical Implications

Why do courts make use of these linguistic rules? Seen in their worst light, the principles are so

numerous and cover so much ground, that a court need only pick from a grab bag of linguistic rules to justify any desired result. Probably something somewhat less sinister is at work. In arriving at their decisions, judges are forced to explain why it is that one party won the dispute and the other lost. Their opinions, when promulgated, become part of the law, just as the cases quoted from in this article are part of the law. As Dworkin (1986) correctly points out, the principal consequence of legal decisionmaking, by legislatures, judges or others, is resort to coercion by the state by virtue of legitimate political process. Nowhere is this better seen than in criminal cases, where severe deprivation of ordinary civil liberties results from conviction.

When the judge acts as linguist, he or she is justifying the decision reached (and, therefore, the coercive action that follows from the decision) by means of what appears to be scientific reasoning. Although the notion of a legal science has been attacked for decades, see, e.g., Frank (1949), judges still impose limits on themselves in what constitutes legitimate justificatory argumentation. It is far easier to tell Mrs. Anderson's insurance company that it must pay $13,000 because application of linguistic principles to an insurance policy leads to the inevitable, scientific conclusion that it must pay, than to tell the insurance company that Mr. Yocum deserves his money, and unless the insurance company pays he is unlikely to get it, because Mrs. Anderson is not wealthy and Mr. Yocum cannot afford to chase her to her home in Nebraska in any event. Thus, the use of linguistic principles in legal argumentation provides legitimacy to the legal system, creating the illusion of science as the basis for decisionmaking. In these circumstances, it should be less surprising that the linguistic principles are applied in an incoherent manner. See Llewellyn (1950) for other examples. Such inconsistencies in the application of legal principles do not characterize the entire legal process. Nor, on the other hand, are they limited to linguistic phenomena. Therefore, as one might expect, their study provides a window into some of the complexities of the legal process.

FOOTNOTES

1. There exists a voluminous literature on statutory interpretation. See Jones, Kernochan and Murphy

(1980) for a general introduction to some of the modes of argumentation.

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